PD-1124-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/14/2021 9:13 AM
Accepted 7/15/2021 8:23 AM
DEANA WILLIAMSON
CLERK

NO. PD-1124-20

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
7/15/2021
DEANA WILLIAMSON, CLERK

JACE MARTIN LAWS,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal from Cause Number 48,106-A
In the 188th Judicial District Court of
Gregg County, Texas and
Cause Number 06-19-00221-CR
In the Court of Appeals for the Sixth
Judicial District of Texas

BRIEF FOR THE STATE OF TEXAS

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ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

PAGE (S)

INDEX OF AUTHORITIES

Texas Cases

Texas Statutes

Texas Rules

NO. PD-1124-20

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

JACE MARTIN LAWS……..…..……..……..Appellant

v.

THE STATE OF TEXAS,…..……...Appellee

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF APPEALS:

COMES NOW, THE STATE OF TEXAS**,** by and through her Criminal District Attorney, Tom B. Watson, and as Appellee in the above numbered and entitled cause, and files this the Appellee's brief showing:

ISSUES PRESENTED

I. **Did the Court of Appeals err in finding Appellant failed to preserve his claim of error as to an alleged violation of Article 36.22?**

II. **Does Article 36.22 of the Texas Code of Criminal Procedure prohibit alternate jurors from being present in the jury room during deliberations?**

III. **If Article 36.22 does not allow alternate jurors to be present during deliberations then is the defense entitled to a presumption of harm when an alternate juror is present during deliberations?**

IV. Did Petitioner suffer any harm from alternate jurors being present during deliberations in his case?

STATEMENT OF THE FACTS

On November 29, 2018 Appellant was indicted for two counts of assault on a peace officer. [CR-I-5-8]. Count 1 alleged Appellant had assaulted Officer Nathaniel Lemmon and Count 2 alleged Appellant had assaulted Officer Christopher Byrdsong. [CR-I-5-8]. The indictment also included an enhancement paragraph due to Appellant having a prior felony conviction for aggravated robbery. [CR-I-8].

Appellant's case was called for trial on October 21, 2019. [RR-IV-1]. On October 23, 2019 the trial court convened a charge conference to discuss the proposed jury charge. [RR-VI-5]. The proposed jury charge instructed the alternate juror to be present during deliberations. [CR-I-83]. The proposed jury charge further instructed the alternate juror that they were not to communicate with the voting members of the jury during deliberations and that they were not to vote. [CR-I-83]. The proposed jury charge also instructed the other members of the jury that they were not to consider any comment, statement, or opinion from the alternate juror. [CR-I-83].

At the charge conference, Appellant objected to the alternate juror being allowed to be present during deliberations. [RR-VI-5-6]. The trial court denied this objection. [RR-VI-6, 8].

The jury charge presented to the jury included the instructions to the alternate juror that they were not to communicate with the voting members of the jury during deliberations and that they were not to vote and that the other jurors were not to consider anything from the alternate juror. [RR-VI-28]. The trial court twice read the instruction to the alternate juror that they were not to participate in deliberations or vote. [RR-VI-28].

The jury found Appellant guilty on both charges. [RR-VI-70].

At the start of the sentencing phase of the trial, Appellant pled true to having a prior felony conviction for aggravated robbery. [RR-VII-9-10].

The proposed jury charge for the punishment phase instructed the alternate juror to be present during deliberations. [CR-I-92]. This proposed jury charge also instructed the alternate juror not to participate in deliberations and not to vote and instructed the other jurors to disregard any comment, statement, or opinion by the alternate juror. [CR-I-92].

At the punishment phase jury charge conference, Appellant objected to the alternate juror being allowed to be in the jury room during deliberations. [RR-VII-152]. The trial court overruled this objection. [RR-VII-152].

The punishment phase jury charge read to the jury instructed the alternate juror not to speak to the voting jurors during deliberations and not to vote and instructed the other jurors that they were not to consider anything from the alternate juror. [RR-VII-164].

The jury sentenced Appellant to 30 years confinement on Count 1 and 40 years confinement on Count 2. [RR-VII-182-183]. Appellant did not object to either of these sentences. [RR-VII-183-186].

Appellant never requested a mistrial due to an alternate juror being present during deliberations. [RR-VI-VII].

No evidence was presented at any point in the trial that the alternate juror participated in deliberations in any way. [RR-VI-VII].

On October 29, 2019 Appellant filed a motion for new trial. [CR-I-99-100. Appellant did not allege there was any improper communication between the alternate juror and the rest of the panel during deliberations in his motion for new trial or that there was otherwise a violation of Article 36.22 in this motion for new trial. [CR-I-99-100]. There is no evidence in

the court record that Appellant ever presented this motion for new trial to the trial court. [CR; RR].

There is no evidence in the record showing there was any improper communication between the alternate juror and the other jurors during deliberations or that the alternate juror influenced juror deliberations in any manner. [CR; RR]. There is no evidence in the record showing that the alternate juror voted during any of the deliberations. [CR; RR].

SUMMARY OF THE ARGUMENT

To preserve a claim of an alleged violation of Article 36.22 of the Texas Code of Criminal Procedure for appellate review, it is not enough simply to make an objection at the trial court level. Instead a party must either file and present a motion for new trial alleging that violation or must seek a mistrial on that basis. Appellant did not file and present an appropriate motion for new trial and did not seek a mistrial on that basis. Therefore Appellant has waived this issue and is barred from arguing it on appeal.

In the alternative, even if Appellant had not waived this issue, Appellant is still not entitled to any relief because there was nothing improper in the alternate juror being allowed to be present in the jury room during the deliberations of the other jurors. Article 33.011 of the Texas

Code of Criminal Procedure describes alternate jurors as jurors. This language is unambiguous and, far from leading to absurd results, is actually the statutory interpretation that best serves judicial efficiency and fairness. It is also immaterial that Article 33.011 describes two categories of potential jurors, alternate jurors and regular jurors. Both categories of juror are still jurors and thus both types of jurors can be present during jury deliberations. Indeed reading Article 36.22 so as to not treat alternate jurors as jurors would itself lead to absurd results since that would remove the statutory prohibition against people speaking to the alternate jurors during the trial. Thus, it is clear that alternate jurors are part of the jury under Article 36.22, and as such there is nothing improper with the alternate jurors being present in the jury room during deliberations.

In the alternative, even if Article 36.22 does not allow alternate jurors to be present during deliberations Appellant still is not entitled to any relief, because Appellant failed to present any evidence of improper communication between the alternate juror and the members of the jury. Accordingly, any error from the alternate juror's presence in the jury room during deliberations was harmless and must be disregarded.

In the alternative again, even if Appellant was entitled to a presumption of harm for a violation of Article 36.22, that presumption was

successfully rebutted. The trial court instructed the alternate juror not to participate in the deliberations, and there is a presumption (that was not rebutted in this case) that jurors understand and abide by the trial court's instructions, Therefore it must be concluded the jurors all abided by the trial court's instructions and that rebuts any presumption of harm.

ARGUMENT

I. Appellant is not entitled to any relief due to an alternate juror being present during deliberations in his case.

A. Appellant failed to properly preserve a claim of error regarding an alleged violation of Article 36.22 and thus is now barred from raising that issue on appeal.

While Appellant did object at the trial court to the alternate juror being allowed to join the other jurors in the jury room during deliberations [RR-VI-5-6; RR-VII-152], those objections were insufficient by themselves to preserve a claim of error on this issue.

A violation of Article 36.22 is considered juror misconduct. See *Hendrix v. State,* No. 05-18-00822-CR, 2020 Tex. App. LEXIS 4633 at 9 (Tex. App.-Dallas 2020, no pet.)(mem. op. not designated for publication.) citing *Ocon v. State,* 284 S.W.3d 880, 885 (Tex. Crim. App. 2009); *Hughes v. State,* 24 S.W.3d 833, 842 (Tex. Crim. App. 2000). For claims of juror misconduct it is not enough simply to make an objection at trial. Instead a motion for new trial, supported by an affidavit, is the proper method for

preserving a jury misconduct error. *Becerra v. State,* No PD-0804-19, 2021 Tex. Crim. App. LEXIS 329 at 8 (Tex. Crim. App. 2021.)

In this case, while Appellant did file a motion for new trial, said motion made no claims of juror misconduct or any violations of Article 36.22. [CR-I-99-100]. Additionally, Appellant failed to ever present this motion to the trial court. [CR; RR]. To preserve an issue by motion for new trial, a defendant must present the motion to the trial court. *Navarro v. State,* 588 S.W.3d 689, 690-691 (Tex. App.-Texarkana 2019, no pet.) Nor is the mere filing of a motion for new trial sufficient to establish presentment. *Id.* at 691. The defendant must ensure the trial court has actual notice of the motion. See *Carranza v. State,* 960 S.W. 2d 76, 79-80 (Tex. Crim. App. 1998.)

Appellant has failed to show the trial court had actual notice of his motion for a new trial. The motion was not hand delivered to the trial court, there is no notation on the motion that the trial court has seen it, and there is no docket entry in the court record showing that the motion was brought to the trial court's attention. [CR]. Thus, there is no evidence that presentment of the motion for new trial occurred in this case.

Now it is true that some circuit courts have also allowed claims of juror misconduct to be preserved not just by filing a motion for new trial

with a supporting affidavit but also by the defendant moving for a mistrial. See *Hendrix,* 2020 Tex. App. LEXIS 4633 at 9; *Castillo v. State,* 319 S.W.3d 966, 970 (Tex. App.-Austin 2010, pet. denied); *Menard v. State,* 193 S.W.3d 55, 59 (Tex. App.-Houston [1st Dist.] 2006, pet. ref'd.) But even under that approach, Appellant has failed to preserve this issue for appellate review because Appellant never sought a mistrial over the alternate juror being allowed to be present with the other jurors during deliberations. [RR-VI-VII].

Therefore, since Appellant neither filed and presented an appropriate motion for new trial or sought a mistrial on a claim of a violation of Article 36.22, Appellant has failed to preserve that issue for appellate review, and as such the Court of Appeals did not err in affirming the trial court's ruling.

B. Article 36.22 of the Texas Code of Criminal Procedure does not prohibit alternate jurors from being present during deliberations.

The Court of Appeals did not err in affirming the trial court's verdict because there was nothing improper in the trial court allowing the alternate juror to be present during deliberations. Alternate jurors are members of the jury and thus are allowed to be present when a jury deliberates.

That alternate jurors are members of the jury is established by the first sentence of Article 33.011(a) of the Texas Code of Criminal Procedure

which reads, "In district courts, the judge may direct that not more than four jurors in addition to the regular jury be called and impaneled" (emphasis added). Thus Article 33.011, the very statutory provision that allows for alternate jurors, immediately and unambiguously identifies alternate jurors as jurors right from the start. There is no ambiguity on this point. The statutory language is crystal clear. Alternate jurors are jurors and thus are necessarily part of the jury.

That alternate jurors are members of the jury is also obvious when considering how alternate jurors are treated throughout the entire trial process. Alternate jurors are drawn and selected in the same manner as regular jurors, they have to have the same qualifications as regular jurors, they take the same oath as regular jurors, and they have the same functions, powers, facilities, security, and privileges as regular jurors. See TEX. CRIM. PROC. Art 33.011(b). And of course alternate jurors sit with the regular jurors during the trial, listen to all the same evidence that regular jurors hear, are expected to follow all the same rules as the regular jurors, and are making the exact same sacrifice of their time to help the justice system function as regular jurors. How then could alternate jurors not be considered members of the jury? No one questions on a football team that the backup quarterback is a member of the team even when they don't start

the game or even when they don't get into a specific game. The same logic should hold true for alternate jurors. They may not be in the jury starting lineup, but they are certainly members of the jury team and as such they are and should be considered just as much a part of the jury as the regular jurors.

Nor is it unreasonable to allow the alternate jurors, as members of the jury, to sit in the jury room during deliberations. Indeed there are significant practical reasons why alternate jurors should be be allowed to sit in the jury room during deliberations. The danger of an alternate juror impermissibly communicating with the regular jurors during deliberations can be minimized by the trial court instructing the alternate juror not to speak during deliberations and instructing the other jurors not to consider anything from the alternate juror. (Safeguards that were employed in this case prior to the start of deliberations at both guilt-innocence and at sentencing. [RR-VI-28, VII-164]. However, no corrective action is possible if a juror has to be replaced during deliberations and an alternate juror is only brought into the deliberation room upon the loss of that other juror. In such a situation, deliberations (and indeed possibly a significant amount of the deliberations) will have taken place without all of the (final) voting members of the jury being present; something that is unfair to both the State and the defense

(both of whom should be able to expect that everyone voting on the case was present for the entirety of the deliberations on the vote.)

This Honorable Court has already noted the benefits to the jury deliberative process that are achieved by having alternate jurors present for the entirety of deliberations. See *Gonzalez v. State,* 616 S.W.3d 585, 594 (Tex. Crim. App. 2020)(noting that since the alternate juror had "the benefit of having attended the pre-substitution deliberations" that obviated any need to question the jurors about their ability to start deliberations over, to confiscate all previously prepared written materials, and to instruct the jury to deliberate anew.) This is only logical. Clearly, it will save a great deal of juror time (with a corresponding reduction in juror frustration) if jurors are able to avoid having to restart deliberations from the beginning every time a juror substitution is made. Allowing the alternate jurors to be (silently) present during deliberations is also the only way to guarantee that, regardless of who the final voting jurors end up being, every juror that votes on the verdict will have been present for the entirety of the deliberations, and thus that the verdict being rendered is truly a fair verdict that was returned after full consideration by all the voting jurors. Thus, it is the best procedure for both judicial economy and to insure the fairness of the trial process.

Appellant now cites to the argument advanced by the Fourth Court of Appeals in the *Trinidad* case that the legislative history of Article 33.011 shows that the legislature did not intend for alternate jurors to be present during deliberations to support his position that alternate jurors cannot be present during deliberations. See *Trinidad v. State,* 275 S.W.3d 52, 59 (Tex. App.-San Antonio 2008, *rev'd on other grounds,* 312 S.W.3d 23 (Tex. Crim. App. 2010.) There are two key flaws with this argument.

First, the legislative history cited by the Fourth Court of Appeals is remarkable thin gruel on this point. All that history cited by the Fourth Court of Appeals shows is that a single member of the legislature expressed their personal preference that alternate jurors be separated from regular jurors until such time as they are seated as a regular member of the juror. Nothing in the legislative history suggests that the Texas legislature itself adopted that viewpoint and in fact the absence of such language in the statute that was ultimately adopted suggests the exact opposite, that the legislature rejected Representative Hughes' preference on that specific point.

But the even bigger problem with Appellant's argument is that under the applicable rules of statutory construction there is simply no justification in this case to even look to the legislative history of Article 33.011 in interpreting the statute. When interpreting a statute, courts are to first look

at the plain language of the statute. See *Boykin v. State,* 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). It is only if the plain language of the statute would lead to absurd results or if the language of the statute is ambiguous that courts may consider extratextual factors such as legislative history. *Id.*

In this case, as previously discussed, the plain language of Article 33.011 is remarkably clear that alternate jurors are jurors. That fact is stated in the very first sentence of the statute. Nor would treating alternate jurors as members of the jury lead to absurd results since, as discussed above, it actually promotes judicial economy and the integrity of the trial process to have alternate jurors present during deliberations. Therefore, since the plain language of Article 33.011(a) clearly describes alternate jurors as "jurors" and since this language does not lead to absurd results, Article 33.011 can be properly interpreted based on the plain language of the statute and as such there is no legal justification to reach beyond the statute.

Nor does it matter that Article 33.011(a) distinguishes alternate jurors from "the regular jury" and "regular jurors". Article 33.011 simply establishes that there are two potential subsets of jurors: alternate jurors and regular jurors. Alternate jurors may be part of a different subset of the jury than the regular jurors, but they still fall within the greater set of the jury. That's what they are identified as jurors in Article 33.011(a), and that is why

they are subject to all the same qualifications and restrictions as the regular jurors. That they are a different type of juror than the regular jurors does not make them any less a part of the jury.

Nor does the fact that Article 33.011(b) describes alternate jurors being called upon to "replace jurors" suggest that alternate jurors are not themselves members of the jury. Obviously, if it becomes necessary for an alternate juror to join the deliberations and voting then they are replacing another juror. As such this statutory language simply reflects that reality. There is also good reason for the legislature to have stated that alternate jurors shall "replace jurors" rather than "replace regular jurors." In a case where multiple alternate jurors are appointed (which is authorized under Article 33.011(a)), it is entirely possible that an alternate juror might be called upon to replace another alternate juror who had previously been called up to join the deliberations and then themselves became unavailable to continue to serve. Therefore, since an alternate juror could conceivably be called in to substitute for either a regular juror or an alternate juror, it only makes sense to use the umbrella term "juror" (which covers both alternate jurors and regular jurors) in the statute.

Nor does the State's interpretation require a reviewing court to rewrite Article 36.22 to give it effect. The State is not asking this Honorable Court

to add a definition of jury into Article 36.22. The meaning of jury (or at least juror) is already established by Article 33.011. The State's thus simply requires the reviewing court to apply the legislative determination of who are jurors, established in Article 33.011, in interpreting Article 36.22. Article 33.011(a) plainly states that alternate jurors are jurors. Thus it is only proper to abide by that legislation determination of who is a member of the jury when applying Article 36.22, and since Article 33.011 says alternate jurors are jurors, they must be treated as part of the jury when it comes to applying Article 36.22.

It must also be noted that the interpretation that alternate jurors are not jurors for the purposes of Article 36.22 would itself lead to absurd results since the second sentence of Article 36.22 states that "No person shall be permitted to converse with a juror about the case on trial except in the presence and by the permission of the court" (emphasis added). If alternate jurors are not "jurors" under Article 36.22 then that second sentence does not apply to alternate jurors which means that any interested party (including the defendant, the attorneys, and any witnesses in the case) would be perfectly free to talk to the alternate jurors about the case while the case is still in progress; an intolerable result that would defeat the entire purpose of having alternate jurors appointed.

Therefore, the only workable interpretation of Article 36.22 which doesn't require the courts to rewrite the statute, is one where alternate jurors are considered part of the jury. That interpretation gives full effect to the second sentence of Article 36.22 (which otherwise provides no protection against alternate jurors being spoken to during the trial proceedings), and it is certainly consistent with the plain language of Article 33.011 (which describes alternate jurors as jurors.) And since Article 36.22 says that "No person shall be permitted to be with a jury while it is deliberating" rather than "No person shall be permitted to be with a regular jury while it is deliberating" that in turn means there is no violation of the statute if alternate jurors are present during the jury's deliberations. They may not be part of the specific subset of "the regular jury", but they are definitely part of "the jury" and as such they can be present during jury deliberations.

C. In the alternative any error Appellant suffered from the alternate juror being present during deliberations was harmless and must be disregarded.

1. Standard of review for claims of non-constitutional error.

Appellant's brief does not allege constitutional error but rather only alleges a statutory violation. Alleged violations of a statutory right are reviewed as non-constitutional error for the purpose of conducting a harm analysis. *Proenza v. State,* 541 S.W.3d 786, 801 (Tex. Crim. App. 2017).

Moreover, in accordance with Texas Rule of Appellate Procedure 44.2(b), any non-constitutional error that does not affect the defendant's substantial rights must be disregarded. *Barshaw v. State,* 342 S.W.3d 91, 93 (Tex. Crim. App. 2011). This means that a defendant's conviction is not to be overturned so long as the reviewing appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury or influenced the jury only slightly. *Id.* at 93-94.

2. Appellant is not entitled to a presumption of harm and thus has failed to meet his burden to show he suffered any harm

Appellant contends he has met that burden because harm should be presumed for any violation of Article 36.22. In support of this Appellant cites to the *Ocon* and *Robinson* cases from this Honorable Court and the *Duke* case from the Sixth Court of Appeals. See *Ocon,* 284 S.W.3d at 884; *Robinson v. State,* 851 S.W.2d 216, 230 (Tex. Crim. App. 1991); *Duke v. State,* 365 S.W.3d 722 (Tex. App.-Texarkana 2012, pet. ref'd.) The State believes *Ocon* and *Robinson* should be distinguished from the current case, and that *Duke* should not control in the weight of more persuasive holdings from other circuit courts.

As to *Ocon* and *Robinson,* while those cases spoke of a presumption of harm for a violation of Article 36.22, it is significant that both those cases involved improper communications to a member of the jury by a third party

rather than improper presence during deliberations. *Ocon,* 284 S.W.3d at 884; *Robinson,* 851 S.W.2d at 230. Indeed the *Ocon* court even noted that if a violation of Article 36.22 was shown the effectiveness of remedies would depend on "whether the conversation influenced the juror" which shows that the *Ocon* court's concern was entirely on improper communication with jurors. *Ocon,* 284 S.W.3d at 884. It is also significant that *Ocon* itself cites to the *Hughes, Moody,* and *Robinson* cases to support the idea of a presumption of harm, all of which are also cases regarding improper communication with jurors rather than improper presence during deliberations.) See *Hughes,* 24 S.W.3d at 842; *Moody v. State,* 827 S.W.2d 875, 899-900 (Tex. Crim. App. 1992); *Robinson,* 851 S.W.2d at 230. Thus, the State would dispute whether *Ocon* and *Robinson* actually intended to create a presumption of harm for all violations of Article 36.22 rather than just for when there is evidence of improper communication between a juror and a third party.

Certainly there is logical reason to apply a different standard for improper presence during deliberations than for improper communication with a juror. After all, actual communication is far more likely to improperly influence a juror than mere presence, and as such, it makes much more sense to presume harm in the former situation than the later.

Accordingly, simply because this Honorable Court has deemed that harm should be presumed when there is evidence of improper communication with a juror, such a rule should not be extended to also cover situations where there is evidence of improper presence during deliberations.

As for the *Duke* case, while that case did hold that the State bears the burden of rebutting a presumption of harm when there is an improper presence during juror deliberations, that ruling of the Sixth Court of Appeals should be weighed against the holdings of the Third Court of Appeals in the *Castillo* case, the Ninth Court of Appeals in the *Jones* case, the Twelfth Court of Appeals in the *Patino* case, and the Fifth Court of Appeals in the *Hendrix* case, In each of those cases the reviewing courts concluded that even if an unauthorized person was present during deliberations, a defendant still has the initial burden to show that there was some sort of communication between that person and the jury and that if the defendant fails to make that showing then they are not entitled to the presumption of harm and their claim will fail. See *Castillo,* 319 S.W.3d at 972-973; *Jones v. State,* No. 09-15-00092-CR, 2015 Tex. App.-LEXIS 11684 at 18 (Tex. App.-Beaumont 2015, pet. ref'd.)(mem. op. not designated for publication); *Patino v. State,* No. 12-18-00327-CR, 2019 Tex. App. LEXIS 8139 at 3 (Tex. App.-Tyler 2019, no pet.)(mem. op. not designated for publication);

Hendrix, 2020 Tex. App. LEXIS 4633 at 10-12.

The State believes the holdings of Third, Fifth, Ninth and Twelfth Courts of Appeals are logical and should control in this matter over the holding of the Sixth Court of Appeals. Mere improper presence is much less likely to taint jury deliberations than improper communication, and it hardly places an unreasonable burden on the defense to show evidence of improper communication (be it verbal or non-verbal) between a member of the juror and the unauthorized person (at which point it would then fall to the State to rebut the presumption of harm) if any such improper contact did occur. Therefore the holdings of *Castillo, Jones, Patino, and Hendrix* should be adopted statewide with the defense being obligated to put on some initial evidence of improper communication (be it verbal or non-verbal) between the alternate juror and a member of the jury before they are entitled to a presumption of harm.

Once that standard is applied it is clear that Appellant did not meet his burden to show harm. Appellant presented no evidence at all either during trial or post-trial showing there was any kind of improper communication between the alternate juror and the members of the jury or that the members of the jury had their deliberations affected in any way from the presence of the alternate juror. [RR; CR]. Therefore Appellant has

failed to show his substantial rights were affected by the presence of the alternate juror and is not entitled to any relief.

3. In the alternative even if Appellant is entitled to a presumption of harm, there was sufficient evidence to rebut that presumption.

In the alternative, even if it is concluded that Appellant is entitled to a presumption of harm from any violation of Article 36.22, Appellant still is not entitled to any relief because the evidence at trial was sufficient to rebut that presumption.

The record of trial shows that the jury instructions given at both the guilt-innocence phase of the trial and at the sentencing phase specifically instructed the alternate juror not to communicate with the other jurors and also specifically instructed the other jurors to disregard any communication from the alternate. [RR-VI-28, RR-VII-164; CR-I-83, 92]. Additionally, during the reading of the jury instructions at guilt-innocence the trial court read the prohibition against participating to the alternate juror twice so as to emphasize how important that provision was. [RR-VI-28].

It is presumed that a jury understands and follows a trial court's instructions in the jury charge absent evidence to the contrary. See *Luquis v. State,* 72 S.W.3d 355, 366 (Tex. Crim. App. 2002). And in this case no evidence was presented from any source suggesting that the alternate juror

or any other member of the jury did not understand or failed to abide by these instructions. [RR; CR]. Thus, it must be presumed that the alternate juror and the other jurors all abided by the trial court's instructions.

It also cannot reasonably be claimed that even if the alternate juror abided by the trial court's instruction not to communicate with the other jurors verbally, that they might have communicated with them non-verbally. Non-verbal communication is communication and would certainly constitute participating in the deliberations if such non-verbal communication occurred. Therefore, the presumption that the alternate juror abided by the trial court's instructions would necessarily require a finding that the alternate juror refrained from both verbal and non-verbal communication with the other jurors.

Nor would holding that the presumption of proper juror can rebut the presumption of harm from an unauthorized person being present during deliberations void that presumption. There would still need to be evidence to overcome the presumption of harm. It does not reverse a presumption simply because another presumption exists that can provide the evidence necessary to rebut that first presumption. Presumptions fall when there is evidence that rebuts them, and in this case there was evidence that the presumption of harm should not apply. That that evidence itself came from

a different (unrebuuted) presumption is immaterial. The judge instructed the alternate juror not to participate in deliberations. [RR-VI-28, RR-VII-164; CR-I-83, 92]. It must be presumed that the alternate juror abided by this instruction since there is no evidence to the contrary. Thus there was evidence of proper juror conduct before the court, and that evidence was sufficient to rebut the presumption of harm.

Therefore, even if Appellant was entitled to a rebuttable presumption of harm from the alternate juror being present during jury deliberations that presumption was rebutted by the evidence (established by the presumption of proper juror conduct which was plainly not rebutted in this case) that the jurors all abided by the trial court's instructions that the alternate juror not participate in the deliberations.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State prays that this Honorable Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I, Brendan Wyatt Guy, Assistant Criminal District Attorney, Gregg County, Texas, certify that the number of words in Appellee's Brief submitted on July 14, 2021, excluding those matters listed in Rule 9.4(i)(1) is 5,211.

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CERTIFICATE OF SERVICE

I, Brendan Wyatt Guy, Assistant Criminal District Attorney, Gregg County, Texas, certify that a copy of the foregoing brief has been served on Jeff T. Jackson, Attorney for Appellant, Jace Martin Laws, by electronic mail at jefftjacksonlaw@gmail.com and on Stacey Soule, State Prosecuting Attorney, by depositing same in the United States Mail, postage prepaid on this the 14th day of July, 2021.

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Associated Case Party: STATE OF TEXAS

Name	BarNumber	Email	TimestampSubmitted	Status
Brendan Wyatt Guy	24034895	Brendan.Guy@co.gregg.tx.us	7/14/2021 9:13:59 AM	SENT
Tom Watson	24058297	tom.watson@co.gregg.tx.us	7/14/2021 9:13:59 AM	SENT

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Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule	24031632	information@spa.texas.gov	7/14/2021 9:13:59 AM	SENT

Associated Case Party: JACEMARTINLAWS

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Jeff Jackson		jefftjacksonlaw@gmail.com	7/14/2021 9:13:59 AM	SENT